Cofab, Inc. and DA Clothing Company, Inc. *and* Philadelphia Joint Board, Amalgamated Clothing and Textile Workers Union, AFL–CIO–CLC. Case 4–CA–22507

September 5, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND FOX

On August 9, 1995, Administrative Law Judge Marion C. Ladwig issued the attached decision. The General Counsel, joined by the Charging Party, filed exceptions and a supporting brief, and the Respondent filed an answering brief to the General Counsel's exceptions.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The judge found that Cofab, Inc. (Cofab) was not an alter ego of DA Clothing Company, Inc. (DA). He based this finding on what he viewed as the completely separate ownership of the two entities and an absence of control by the owner of DA over the subsequently created entity, Cofab. Having found that the two were not alter egos, the judge concluded that Cofab was not bound by the terms of DA's collective-bargaining agreement with the Union. The General Counsel has excepted to these findings, and we find merit in this exception.

I. BACKGROUND

The relevant credited facts are set forth fully in the judge's decision. Briefly, DA was a union clothing contractor, owned by Phyllis D'Amore, which worked on high-quality clothing for unionized manufacturers and was a party to the Union's national contract. Starting as early as 1990, the profitable high-quality clothing work began to decrease until December 1992, when none remained. DA was forced to close for several weeks between December 1992, and January 1993, while Robert D'Amore, a DA salesman, supervisor, and son of the owner Phyllis D'Amore, unsuccessfully sought further high-quality work. From that time forward, (except for 2 day's work in late January 1993), DA was able to obtain work only on low-quality clothing for Charles Navasky Co. DA never sought assistance from the Union in either obtaining other work or for any concessions under the contract. On December 17, 1993, DA permanently closed without any notice to the Union. On December 18, 1993, Robert D'Amore met with the landlord at the Clifton Heights location and began negotiating a 5-year lease at an industrial building some 12 or 15 minutes away from the DA plant. On January 29, 1994, Robert D'Amore opened Cofab as its owner.

Although Robert D'Amore sought other high quality work, Cofab continued to manufacture low-quality clothing for its only customer, Charles Navasky Co. Robert D'Amore admitted that Cofab's work for Navasky was "very similar to the work that DA did for Navasky" and that "the employees perform the work about the same way." Moreover, that work was performed on most of the same machines and equipment, since Robert D'Amore had purchased the best of DA's equipment for Cofab (including 20 sewing machines, 15 pressing machines, 1 PW type 42 grease machine, 1 grease 101 buttonhole machine, 2 Singer button machines, and 2 Singer 250 single-needle sewing machines) with a no-interest note for $5175, payable in 18 months to DA. Additionally, the parties stipulated that "at all times since Cofab began its manufacturing operations, a majority of employees on Cofab's payroll had worked for DA," numbering 19 of 25 employees on February 6, 1994, and, approximately 23 of 24 employees on April 11, 1994. In hiring the employees, Robert D'Amore sought the help of his mother, who called and hired "about 20" DA employees to work at Cofab. Phyllis D'Amore made it clear to these employees that there would be no union at Cofab.

Finally, all of the supervisors and management officials of Cofab were substantially identical to those at DA—Robert D'Amore and Edmundo D'Urbano were the supervisors at both DA and Cofab.[1] DA's other supervisor, owner Phyllis D'Amore, also played a substantial role and was a regular presence at Cofab, although not monetarily compensated. Phyllis D'Amore not only hired the majority of Cofab's employees, she was involved in the unlawful layoff of employee Italia Tigano.[2] She also engaged in numerous activities on behalf of Cofab, committing several violations of the Act, as set forth fully in the judge's decision, including informing employees that their continued employment depended upon abandoning support for the Union, threatening to discharge employees if they supported the Union, and creating the impression of surveillance of union activities and support.[3]

On the basis of the foregoing facts, the judge concluded that Cofab was the successor to DA, relying on

[1] We agree with the judge, that, contrary to the Respondent's contentions, Khing Thong Lee occupied the same nonsupervisory position at both DA and Cofab, namely as the "bundle boy." Additionally, contrary to the Respondent's assertions, Deborah D'Amore, Robert's wife, was not shown to be a supervisor at Cofab or DA. No evidence was adduced establishing that Deborah ever exercised any supervisory authority at Cofab, nor did she receive any compensation.

[2] No exceptions were filed to the judge's finding that the Respondent's layoff of Tigano violated Sec. 8(a)(3) and (1) of the Act.

[3] No exceptions were filed to the judge's finding that D'Amore's conduct violated Sec. 8(a)(1) of the Act.

the factors set forth in *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27, 41–43 (1987), as summarized in *Hydrolines, Inc.*, 305 NLRB 416, 421 (1991), because Cofab had "the same production process," produced "the same products," on "mostly the same machines," for the identical customer, under "the same working conditions," with a majority of the same employees and, with the same supervisory and managerial as DA.[4] The judge further concluded, however, that Cofab was not an alter ego of DA because he found a lack of "substantially identical common ownership" and no control over Cofab's business by the owner of DA, citing *Superior Export Packing Co.*, 284 NLRB 1169, 1170 (1987). Accordingly, the judge found that the Respondent was required to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the unit but was not bound by the terms of the DA's collective-bargaining agreement with the Union.

II. ALTER EGO RELATIONSHIP

The Board considers a number of factors in determining whether two nominally distinct entities are alter egos. The Board looks to whether the two have "'substantially identical' management, business purpose, operation, equipment, customers and supervision," whether there is common ownership, whether the two use the same building, whether there was a minimal "hiatus" between the closing down of one and the commencement of the other, and whether the "purpose behind the creation of the alleged alter ego" was "to evade responsibilities under the Act."[5] In making the evaluation, no one factor is determinative, nor do all of the above indicia need be present to find that an alter ego relationship exists. In particular, identical ownership is not a prerequisite for finding an alter ego relationship.[6] We also note that many of the factors considered by the Board in finding successorship are identical to those considered in determining whether two entities have an alter ego relationship.

An evaluation of all of these factors leads us to conclude that an alter ego relationship exists between Cofab and DA. As detailed above, and relied on by the judge in finding successorship, Cofab and DA had substantially identical management and supervisors, business purpose, operations, equipment, and customers, albeit operated at different premises. Moreover, the hiatus in operations between DA's closing and Cofab's opening of slightly over 1 month was insubstantial and, indeed, was consistent with DA's previous year closing for several weeks when business was slow.

Further, unlike the judge, we find that DA and Cofab did have substantially identical common ownership. It is well established that where members of the same family are the owners of two nominally distinct entities, which are otherwise substantially the same, ownership and control of both of the entities is considered substantially identical.[7] In other words, in evaluating all of the relevant factors, where two entities are virtually indistinguishable but for the difference in ownership of the entities by members of the same family, substantially identical ownership is established. Thus, although DA was owned by Phyllis D'Amore and Cofab is owned by her son Robert D'Amore, we conclude, in light of all of the other relevant factors discussed above, the ownership of DA and Cofab by members of the same family militates in favor of an alter ego finding.[8]

Turning to the final factor, we find that the record is replete with evidence that the purpose of creating Cofab was to get out from under what Phyllis and Robert D'Amore believed to be the crushing financial burden of the Union's presence at DA, and thus, to

[4] We note that no exceptions have been filed to this successorship finding or to the individual factors relied upon which support the finding.

[5] *Continental Radiator Corp.*, 283 NLRB 234 (1987), quoting *Advance Electric*, 268 NLRB 1001, 1002 (1984). Accord: *MIS, Inc.*, 289 NLRB 491, 492 (1988).

[6] *All Kind Quilting*, 266 NLRB 1186 fn. 4 (1983); *Fugazy Continental Corp.*, 265 NLRB 1301 (1982), enfd. 725 F.2d 1416, 1420 (D.C. Cir. 1984); *American Pacific Concrete Pipe Co.*, 262 NLRB 1223, 1226 (1982).

[7] *Fire Tech Systems*, 319 NLRB 302 (1995); *Holt Plastering*, 317 NLRB 451, 456 (1995) (Member Browning concurring in relevant part); *Walton Mirror Works*, 313 NLRB 1279, 1284 (1994); *Vinisa II, Ltd.*, 308 NLRB 135, 137 (1992); *Weinreb Management*, 292 NLRB 428, 430–431 (1989); *Mar-Kay Cartage*, 277 NLRB 1335 (1985); *Super Saver*, 273 NLRB 20, 28 (1984); *Crawford Door Sales Co.*, 226 NLRB 1144 (1976).

The judge's reliance on *Superior Export Packing Co.*, supra, is misplaced. There, unlike here, the Board held that two entities, which were not owned by the same individual or members of the same family, lacked substantially identical ownership and, thus, based on all of the relevant factors, precluded a finding of an alter ego relationship. Thus, the Board expressly stated that the basis for finding a lack of common ownership was that the two entities were not owned by members of the same family.

[8] The cases cited by the Respondent are inapposite. In both *First Class Maintenance Service*, 289 NLRB 484 (1988), and *Victor Valley Heating & Air Conditioning*, 267 NLRB 1292 (1983), the Board held that, despite a familial relationship between owners of the two entities, the totality of circumstances in each case did not establish an alter ego relationship. In *First Class Maintenance*, unlike here, the Board found that there was not substantially identical ownership, management, or supervision, nor was there an unlawful motivation in the creation of the alleged alter ego to evade responsibility under the Act. In *Victor Valley*, also unlike here, the Board adopted the judge's finding that there was not substantially identical management, supervision, nor a motive to evade responsibility under the Act, but rather that the two entities were operated separately and that the new entity was to take over a field of business which the older entity was abandoning. Moreover, further unlike here, in both *First Class Maintenance* and *Victor Valley*, the older entity (owned by the parents of the owner of the new entity) remained in business, and there was no evidence that the parents intended to close down their own business or transfer ownership of their business to their children. See also *Shellmaker Inc.*, 265 NLRB 749 (1982), and *Friederich Truck Service*, 259 NLRB 1294 (1982).

evade the responsibility of bargaining with the Union as the employees' collective-bargaining representative under the Act. The credited testimony of employees Maria Rivera, Esther Munson, and Italia Tigano, discussed below, included several statements made by Phyllis D'Amore to employees in October, November, and December 1993 that she could no longer afford the Union, that the Union was going to force her to close the business, and that she intended to put the business in her son's name. Additionally, the threatening and unlawful statements made by Phyllis D'Amore in February 1994 to Cofab employees, as well as the discriminatory layoff of Italia Tigano on March 9, 1994, all clearly indicate an animosity to the Union and a desire to be rid once and for all of the Union's presence in the D'Amore's business at whatever cost. These various statements and violations all indicate that the closing of DA and the creation of Cofab were motivated by a desire to evade bargaining responsibility under the Act.

On the basis of all the foregoing factors, we conclude that DA and Cofab are alter egos and, therefore, that Cofab was not privileged to withdraw recognition from, or to repudiate its obligations under, the collective-bargaining agreement with the Union. Cofab is thus bound by the terms of DA's collective-bargaining agreement with the Union.[9] Accordingly, we shall order that Cofab be required, on request, to reinstate the terms of that collective-bargaining agreement and to make employees whole, with interest, for any losses suffered as a result of its failure to continue in effect the terms of the contract with the Union.

III. ALLEGED 8(A)(1) AND (5) VIOLATIONS

A. *The Section 10(b) Dismissal*

The complaint alleged that the Respondent unlawfully: (1) threatened in October 1993 to close the business; (2) threatened in October or November 1993 to transfer ownership; (3) threatened in December 1993 to close and transfer ownership of the business; (4) failed since November 1993 to continue in effect the terms of the union agreement by failing to make benefit payments; and (5) closed the DA plant on December 17, 1993 without notice and an opportunity for the Union to bargain. The judge dismissed these allegations, however, finding that because the entity DA was not named as a respondent in any charge or amended charge until June 29, 1994, over 6 months after the dates of the alleged unlawful conduct enumerated above, the charges were untimely under Section 10(b) of the Act.

We note, however, that timely filing charges against one entity of an alter ego employer constitutes a timely filing against the other entity, even though that second entity is not specifically named as a respondent in the charge, since the two entities are treated as one employer whose interests are identical.[10] Thus, based on our finding of an alter ego relationship between DA and Cofab, we find that DA, in the person of its alter ego, Cofab, was properly and timely served the charge on March 3, 1994, and the amended charge on April 29, 1994, within the 10(b) period. This is so, even though DA was not specifically named as a Respondent in any charge until the second amended charge on June 29, 1994, which would have been outside the 10(b) period.[11] Therefore, the complaint allegations enumerated above are timely and we shall address them here.[12]

B. *The Dismissed Allegations*

In October 1993, the union business agent and two other union representatives visited the DA plant to investigate complaints that nonunion employees were working at the DA plant. During that visit, they discovered, in addition to the 7 union members whose gross wages and hours DA was reporting to the Union's insurance fund, approximately 30 nonunion employees who were working at DA. DA was neither enforcing the union-shop provision of the union contract nor making the contractual fringe benefit payments for these nonunion employees. Subsequently, in November 1993, DA deducted and sent to the Union dues for most of these nonunion employees.

After the visit from the union representatives in October 1993, the credited testimony shows that Phyllis D'Amore began complaining to employees regarding the Union. Phyllis D'Amore stated to employee Maria Rivera that "she couldn't afford to have the Union because then she will have to pay the benefits for everybody," and that "they're going to force me to close the place." Employee Esther Munson testified that Phyllis D'Amore said that "she didn't need that place, because she had enough money to last her until she died. The only one she was worried about was her son Bobby [Robert D'Amore]." Subsequently, "a couple of days" later, Phyllis D'Amore stated that "she was going to put the business in Bobby's name, because

[9] *Denzil S. Alkire*, 259 NLRB 1323, 1325 (1982); *J. M. Tanaka Construction*, 249 NLRB 238, 239 (1980); *Marquis Printing Corp.*, 213 NLRB 394 (1974).

[10] *Southeastern Envelope Co.*, 246 NLRB 423, 424 (1979); Cf. *H. P. Townsend Mfg. Co.*, 317 NLRB 1169, 1171 (1995).

[11] We note, however, that DA was named in the text of the initial charge filed on March 9, 1994, and in the subsequently amended charge on April 29, 1994, alleging that Cofab should be charged with responsibility for DA's conduct. A copy of this charge was hand delivered to Robert D'Amore.

[12] Based on our finding here of an alter ego relationship between DA and Cofab, we find it unnecessary to pass on whether Cofab is also a *Golden State* successor of DA, as set forth in *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973).

she didn't need the goddamn business." Recalling similar statements by Phyllis D'Amore in November, 1993, Rivera further testified:

> [She said] she was getting too old; it was too much going on. They want to bring the Union into the shop. She couldn't take it. Her husband was sick . . . [She said] I'm just going to have to pass it away to my son because I cannot handle it anymore.

Additionally, in December 1993, Phyllis D'Amore told employee Italia Tigano that she had obtained a lawyer to "put as the son the name because she don't want to run no more the place," that "[i]t costs the son close to $70,000 to do all," and that the son "uses [his] saving money." Tigano further testified that Phyllis D'Amore stated that she was "losing the building" because "the city was going to take the building" and that she could not pay "the Union [benefit funds]."[13]

We find that these statements made by Phyllis D'Amore to employees Rivera, Munson, and Tigano constituted threats of plant closure and threats to transfer ownership of the business in violation of Section 8(a)(1) of the Act. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 619 (1969).

Finally, it is uncontradicted that DA failed, since November 1993, to adhere to the terms of the Union's agreement by failing to make benefit payments to the benefits funds and closed the plant on December 17, 1993, without notice to the Union and an opportunity for the Union to bargain. Accordingly, by failing and refusing to bargain with the Union as the exclusive collective-bargaining representative of the employees in the unit, we find that the Respondent violated Section 8(a)(5) and (1) of the Act.

AMENDED CONCLUSIONS OF LAW

1. The Respondent, DA Clothing Company, Inc., and Cofab, Inc., its alter ego, constitute an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By failing to continue in effect all the terms and conditions of the collective-bargaining agreement with the Union by failing to make required benefit fund payments since November 1993, closing the DA plant on December 17, 1993, and reopening under the name Cofab on January 29, 1994, without prior notice to the Union and an opportunity for the Union to bargain over the decision to close and it effects, and withdrawing recognition from the Union and refusing to recognize and bargain with the Union since late February 1994, the Respondent has engaged in unfair labor practices in violation of Section 8(a)(5) and (1) of the Act.

3. By discriminatorily laying off Italia Tigano on March 9, 1994, the Respondent violated Section 8(a)(3) and (1) of the Act.

4. By threatening employees with plant closure and transfer of ownership of the business because of the Union's presence at the plant, informing an employee that her continued employment depended upon her abandoning support for the Union, threatening to discharge employees if they supported the Union, and creating the impression of surveillance of union activities and support, the Respondent violated Section 8(a)(1) of the Act.

AMENDED REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we find that it must be ordered to cease and desist and to take certain affirmative actions designed to effectuate the policies of the Act.

Having found that the Respondent discriminatorily laid off Italia Tigano in violation of Section 8(a)(3) and (1), we shall order the Respondent to make her whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of her layoff to the date she declined a recall, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Additionally, having found that the Respondent unlawfully withdrew recognition from the Union and failed to notify or bargain with the Union over its decision to close the DA plant and its effects in violation of Section 8(a)(5) and (1), we shall require the Respondent to recognize and, on request, bargain with the Union in good faith as the exclusive representative of the employees in the appropriate bargaining unit, offer immediate employment to any DA employees who were not offered employment at Cofab, and make them whole for any loss of earnings and other benefits they may have suffered as result of the Respondent's failure to offer them employment at Cofab, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Further, having found that the Respondent failed to continue in effect all the terms and conditions of the collective-bargaining agreement with Union by failing to make required benefit fund payments in violation of Section 8(a)(5) and (1), we shall order the Respondent to pay all such delinquencies from the date of its unlawful action, including any additional amounts due to

[13] Robert D'Amore testified that DA owed $40,000 or $45,000 for Philadelphia use and occupancy taxes and about $30,000 or $35,000 for the business privilege tax. Additionally, the D'Amore Family Partnership (of Robert, Phyllis, and Sandrino, Phyllis' husband), who owned the DA building, owed approximately $55,000 in real estate taxes on the building.

the funds in accordance with *Merryweather Optical Co.*, 240 NLRB 1213 (1979), with interest to be computed in the manner set forth in *New Horizons for the Retarded*, supra. Additionally, the Respondent shall abide by the terms and conditions of its collective-bargaining agreement with the Union and shall, on request, reinstate the terms and conditions of employment set forth in that agreement, and shall make whole those employees offered employment at Cofab for any losses they have suffered because of the Respondent's failure to adhere to such terms and conditions of the collective-bargaining agreement, as prescribed in *Kraft Plumbing & Heating*, 252 NLRB 891 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), plus interest to be computed in the manner prescribed in *New Horizons for the Retarded*, supra.

ORDER[14]

The National Labor Relations Board orders that the Respondent DA Clothing Company, Inc., and its alter ego Cofab, Inc., Clifton Heights, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Laying off or otherwise discriminating against any employee for supporting the Philadelphia Joint Board, Amalgamated Clothing and Textile Workers Union, AFL–CIO–CLC or any other union.

(b) Threatening employees with plant closure and transfer of ownership of the business because of the Union's presence at the plant, informing any employee that continued employment depends on abandoning support for the Union, threatening to discharge any employee for supporting the Union, or creating the impression of surveillance of union activities and support.

(c) Withdrawing recognition from and refusing to bargain with the Union, by closing the DA plant on December 17, 1993, and reopening under the name Cofab on January 29, 1994, without prior notice to the Union and an opportunity for the Union to bargain over the decision to close and its effects; refusing to recognize and bargain with the Union since late February 1994; and failing to continue in effect all the terms and conditions of the collective-bargaining agreement with the Union, as the exclusive bargaining representative of the employees in the following appropriate unit, by failing to make required benefit fund payments since November 1993:

> All employees of Cofab, Inc. including clerical, office employees, except executives, supervisors, administrative, professional confidential employees or guards, as defined in the National Labor Relations Act.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and, on request, bargain with the Union as the exclusive representative of the employees in the above unit.

(b) On request, reinstate and abide by the terms and conditions of employment in the collective-bargaining agreement with the Union.

(c) Make Italia Tigano whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the amended remedy section of this decision.

(d) Offer immediate employment to any employees not offered positions at Cofab, make the contractually required payments to the benefit funds that were unlawfully withheld since November 1993, make whole the unit employees for any losses they may have suffered as a result of the failure to make such payments, and for any other losses they may have suffered as a result the failure to adhere to the terms and conditions of employment in the collective-bargaining agreement with the Union, as set forth in amended remedy section of this decision.

(e) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Clifton Heights, Pennsylvania copies of the attached notice marked "Appendix."[15] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employ-

[14] In addition to the modifications of the judge's recommended Order to conform to our decision here, we shall also modify the Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

[15] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

ees employed by the Respondent at any time since March 4, 1994.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn affidavit of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT lay off or otherwise discriminate against any of you for supporting the Philadelphia Joint Board, Amalgamated Clothing and Textile Workers Union, AFL–CIO–CLC or any other union.

WE WILL NOT threaten to close the plant or to transfer ownership of the business because of the Union's presence.

WE WILL NOT tell you that you must abandon support for the Union to work here, threaten to discharge you for supporting the Union, or create the impression of surveillance of your union activities and support.

WE WILL NOT withdraw recognition from the Union or refuse to bargain with the Union, by closing the DA plant, and reopening under the name Cofab, without prior notice to the Union and an opportunity for the Union to bargain over the decision to close and it effects.

WE WILL NOT refuse to recognize and bargain with the Union as the exclusive bargaining representative of the employees in the following appropriate unit, by ceasing payment of required benefit funds and by failing to continue in effect all the terms and conditions of the collective-bargaining agreement with the Union:

> All employees of Cofab, Inc. including clerical, office employees, except executives, supervisors, administrative, professional confidential employees or guards, as defined in the National Labor Relations Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize and, on request, bargain with the Union as the exclusive representative of the employees in the above unit.

WE WILL, on request, reinstate and abide by the terms and conditions of employment in the collective-bargaining agreement with the Union.

WE WILL offer immediate employment to any DA employees not offered positions at Cofab.

WE WILL make whole the unit employees for any losses they may have suffered as a result of our failure to adhere to the terms and conditions of employment in our collective-bargaining agreement with the Union, plus interest.

WE WILL make the contractually required payments to the benefit funds that we unlawfully failed to make since November 1993, and WE WILL make whole the unit employees for any losses they may have suffered as a result of our failure to make such payments, plus interest.

WE WILL make Italia Tigano whole for any loss of earnings and other benefits suffered as a result of her layoff, less any net interim earnings, plus interest.

COFAB, INC. AND ITS ALTER EGO DA CLOTHING COMPANY, INC.

Richard P. Heller, Esq., for the General Counsel.
Marc Furman, Esq. (Rothenberg & Silverman), of Elkins Park, Pennsylvania, for the Respondent.
Lynne P. Fox, Esq., of Philadelphia, Pennsylvania, for the Charging Party.

DECISION

STATEMENT

MARION C. LADWIG, Administrative Law Judge. This case was tried in Philadelphia, Pennsylvania, on January 18–19, 1995. The charge was filed on March 2, 1994[1] (amended April 29 and June 29), and the complaint was issued June 29.

For many years DA Clothing Company, Inc. (DA), a union clothing contractor in Philadelphia, worked on high-quality clothing for union manufacturers. By December 1992, all of this profitable work had ended. Beginning in 1993, DA was able to obtain only unprofitable work (for a union contractor) on low-quality clothing. Instead of seeking union assistance in obtaining other work or union concessions, DA violated the union contract, employing mostly nonunion employees and paying only the few union employees the contractual benefits.

In December 1993, after failing to obtain profitable work, DA closed without notifying the Union. Six weeks later the owner's son opened a completely nonunion plant about 12 or

[1] All dates are September 1993 through June 1994 unless otherwise indicated.

15 minutes away in Clifton Heights. Incorporated as Cofab, Inc. (Cofab), it performed the same type work for the same customer with mostly the same employees and equipment, under the direction of supervisors formerly employed by DA.

The primary issues are whether Respondent Cofab (a) unlawfully refused to recognize and bargain with the Union—as a successor, as a *Golden State* successor (requiring it also to remedy DA's alleged unfair labor practices despite no timely charge having been filed against DA), or as an alter ego (despite separate ownership), (b) discriminatorily laid off an employee on the belief that she revealed Cofab's new location to the Union, and (c) otherwise coerced its employees, violating Section 8(a)(1), (3), and (5) of the National Labor Relations Act.

On the entire record,[2] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Cofab, and the Union, I make the following

FINDINGS OF FACT

I. JURISDICTION

Cofab, a corporation, performs various operations related to the manufacture of clothing at its facility in Clifton Heights, Pennsylvania. It annually provides over $50,000 in services to Charles Navasky Co., which annually ships from its Pittsburgh facility goods valued over $50,000 directly outside the State. Cofab admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Refusal to Bargain*

1. Closing of DA

DA (incorporated in 1976) was a party to the Union's national contract (Tr. 49–50, 249–250; G.C. Exh. 4). As a union clothing contractor, the Company had employed as many as 110 or 120 employees, working on high-quality clothing for union manufacturers—performing cutting, ticketing, fusing, assembling (sewing), pressing, finishing, and some pattern and designing work (Tr. 12, 17, 32–33, 84, 117–119, 152–153, 319.)

From 1990 or before, however, the work "was dwindling" (Tr. 94). By December 1992 all of this profitable work on high-quality clothing had ended. As testified by Robert D'Amore, the son of DA Owner Phyllis D'Amore (and the only defense witness), there was then (Tr. 23)

> No work at all, whatsoever. And what made it unusual was . . . my mother always had work in the shop. It might have been slow, but there was always something there. But that particular time, there was no work at all. I mean, nothing.

DA closed for several weeks while Robert D'Amore (as DA's salesman) was seeking further high-quality work. For whatever reasons, there was none available. From that time on, the only work that DA was able to obtain (except for 2 days' work on jackets for George Huston in late January, Tr. 103) was on low-quality clothing for Charles Navasky Co. D'Amore testified that he called "all the manufacturers" because Navasky's "price was cheap" and DA "[c]ouldn't survive on those kind of prices." He explained that whereas DA could charge $25 for work on high-quality women's clothing, Navasky was paying $13.50 "on men's jackets and about $9 for boys' jackets." (Tr. 32, 87, 93–94, 96–97, 124, 354, 387; G.C. Exh. 2 par. 3.)

DA did not seek assistance from the Union in obtaining other work or ask for any concessions under the contract (Tr. 265–268).

In October the Union received a complaint that there were nonunion employees at the plant. Business Agent Salvatore DiGenova and two other union representatives visited the plant and "found a shop full of people," even though DA was reporting to the Union's insurance funds in New York the gross wages and hours of only seven union members. They passed around a yellow pad for the nonunion employees to sign their name, address, and social security number, and 30 of them signed it. (Tr. 253–259, 389; G.C. Exhs. 5, 6.)

The Company was neither enforcing the union-shop provision in the union contract nor paying the insurance funds for the contractual fringe benefits of the nonunion employees, who then comprised a large majority of the employees. In November, however, the Company deducted and sent to the Union the dues "for almost all the people who were on the yellow pad" (Tr. 260; G.C. Exh. 4 pp. 2, 11–18). There is no evidence of any former nonunion employee objecting to joining the Union.

After the union representatives left the plant, Owner Phyllis D'Amore began complaining to the employees. Employee Maria Rivera credibly testified that Phyllis D'Amore said they were trying to bring the Union into the shop (where "she only had a few people that were in the Union"), that "she couldn't afford to have the Union because then she will have to pay the benefits for everybody," and "They're going to force me to close the place." (Tr. 42, 209–210, 215–216.)

Employee Esther Munson credibly testified that Phyllis D'Amore "said that she didn't need that place, because she had enough money to last her until she died. The only one she was worried about was her son Bobby [Robert D'Amore]." Then "a couple of days" later, Phyllis D'Amore came by with her husband and said "she was going to see a lawyer. That she was going to put the business in Bobby's name, because she didn't need the goddamn business." (Tr. 229–230.)

In November, as Maria Rivera further recalled (Tr. 211):

> [Phyllis D'Amore said] she was getting too old; it was too much going on. They want to bring the Union into the shop. She couldn't take it. Her husband was sick. . . . I'm just going to have to pass it away to my son because I cannot handle it anymore.

In December, as employee Italia Tigano credibly testified (in her broken English), Phyllis D'Amore said she "got the lawyer" to "put as the son the name because she don't want to run no more the place," that "It cost the son close to

[2] The General Counsel's unopposed motion to correct the transcript, filed March 31, 1995, is granted and received in evidence as G.C. Exh. 9.

$70,000 to do all," and that the son "uses [his] saving money" (Tr. 136, 140, 161). Tigano also credibly recalled that Phyllis D'Amore had said that "She was losing the building" because "The city was going to take the building" and that she could not pay "the Union [benefit funds]" (Tr. 175).

Robert D'Amore testified that earlier that year, DA owed $40,000 or $45,000 for the Philadelphia use and occupancy taxes and about $30,000 or $35,000 for the business privilege tax, and that the D'Amore Family Partnership (of Robert, Phyllis, and Phyllis' husband Sandrino) owed around $55,000 in real estate taxes on the building. He testified that at the time DA closed in December, its total indebtedness (including its indebtedness to the benefit funds) was over $300,000. He testified that DA was not making a profit on the Navasky work and that he concluded that DA "had no chance" of surviving because it owed too much money. (Tr. 22, 107, 109, 112–113, 115, 126–127, 263–265, 393.)

On Friday, December 17, DA permanently closed without any notice to the Union (Tr. 261; G.C. Exh. 2 par. 3).

I discredit Robert D'Amore's claims that he did not participate in the decision to cease operations and that he did not learn about the decision "to close and not open up again" before December 17 (Tr. 20, 60). By his demeanor on the stand, he did not impress me as being a candid witness. I note that in his pretrial affidavit given on April 14 (4 months later), he claimed (G.C. Exh. 8 p. 17), "When it closed [on] December 17, 1993, I learned *within a few days* [emphasis added] that it would not reopen."

2. Opening of Cofab at new location

Before December 17 Robert D'Amore found a new location, which he "had looked at." A salesman told him in November, "There's a location out in Clifton Heights and the place has been a shop before, and the electricity was still there." On December 18 (the day after DA closed), D'Amore met with the landlord and began negotiating a 5-year lease of the third floor of this industrial building in Clifton Heights, about 12 or 15 minutes from the DA plant. D'Amore had no cosigner on the lease. (Tr. 29–30, 63–64, 67–68, 377; C.P. Exh. 1A.)

D'Amore testified that he spent about $60,000 from his retirement plan to finance the new business. This covered the legal expense in incorporating Cofab and the payment of the first 9 months' rent on the Clifton Heights building at $1500 a month, which included heat and water, without any real estate tax. (DA had been paying $1635 a month rent to the family partnership for the Philadelphia plant, which remains vacant except for the equipment that Cofab left behind. The $1635 rent, covering the mortgage on the building, did not include the real estate taxes, which DA had agreed to pay.) D'Amore's retirement money also covered the cost of a new boiler, the payment of about $1000 to a Navasky truckdriver to move equipment from the old plant to the new, and start-up expenses, including the payroll. (Tr. 24–25, 64–67, 306, 313–314, 411–412, 418–419, 446–448; R. Exh. 7.)

His retirement money did not cover the cost of DA equipment, the best of which he selected for Cofab: 20 sewing machines, 15 pressing machines, 1 PW type 42 grease machine, 1 grease 101 buttonhole machine, 2 Singer button machines, and 2 Singer 250 single-needle sewing machines. He purchased this equipment for $5175, after an appraisal, giving DA a note payable without interest in 18 months. (Tr. 26–28, 51, 65, 306, 393–394).

Before opening the Cofab plant on January 29, Robert D'Amore solicited high-quality work from DA's former customers, including such major customers as Jones of New York. Again he found that only Navasky's low-quality work was available. At the time of trial he had obtained no other work. (Tr. 30, 367, 444–445.)

Robert D'Amore admits that Cofab's work for Navasky "is very similar to the work that DA did for Navasky in 1993" and that "the employees perform the work about the same way" (Tr. 33, 53, 116).

The parties have stipulated that "At all times since Cofab began its manufacturing operations, a majority of employees on Cofab's payroll had worked for DA," including 19 of 25 employees on February 6 and about 23 of 34 employees on April 11 (G.C. Exh. 2 par. 1). Robert D'Amore had placed an ad in the local papers, but "didn't get that great of a response." He admitted that he then sought his mother's help in hiring DA employees (Tr. 43):

> I said, "You *know these people better* than I do. You work with them every day at DA. . . . Do me a favor. Could you call some of them and ask them to come and work for me?" [and *she called*] about 20. [Emphasis added.]

On questioning by the company counsel, D'Amore claimed (Tr. 76) that his mother "didn't have any influence" in that process and she called "a couple" of people when he told her, "I need them." Later when recalled as a defense witness, he gave a different number of employees she had called. Instead of her calling 20 employees (as he first testified) or 2 employees (as he next testified), he claimed this time (Tr. 326) that he himself "called 12, 14 people" and "She called about four or five, half dozen people." I discredit these claims and credit his earlier admission that his mother called "about 20" DA employees to work at Cofab.

Phyllis D'Amore made it clear that Cofab employees would not be represented by the Union. Employee Tigano credibly testified (Tr. 141, 182) that when Phyllis D'Amore called her around the end of January, "She say if you want to come back, no union."

On the question of whether Cofab and DA had the same supervisors, I find that much of Robert D'Amore's testimony was fabricated.

Robert D'Amore. Regarding his own supervisory status at DA, D'Amore was obviously falsifying his pretrial affidavit—given in the presence of the company counsel (Tr. 366, 450)—when he claimed (G.C. Exh. 8 p. 6):

> I was *only a salesman* for DA. I had no production responsibilities. [Emphasis added.]

Although admitting that he was paid a salary of $78,000 a year ($1500 a week), D'Amore denied that he was the general manager, as stated in the Dun and Bradstreet business information report dated March 26 (Tr. 14–15, 355, 426; G.C. Exh. 3). He denied that he ever directed employee work in any way, claimed that he directed employee work in his mother's absence only "If my mother told me what to do," and claimed that when employees asked him questions in his mother's absence, he would respond, "You know better than

I. You're the operator, you know. Do what you have to do" unless "my mother gave me orders what to tell them" (Tr. 40, 362–364).

In sharp contrast, employee Marie Rivera credibly testified that Phyllis D'Amore was in charge of DA, but when she was not there, Robert D'Amore "would run the business like the same way as if his mother was there." He regularly worked in the shipping department and would tell Rivera which jobs came first. (Tr. 208–209.)

Employee Esther Munson agreed that Phyllis D'Amore "was in charge of the business," but observed that "if it wasn't for" her son, "she couldn't have done it by herself." She credibly explained that Phyllis D'Amore "was downstairs most of the time" and he "was upstairs. So, he took care of the shipping department. . . . Sometimes he was in his office, but most of the time he was on the floor." Munson considered him to be a manager, because "He mainly managed the second floor," where there were eight employees in the shipping department and five in the upstairs pressing department. (Tr. 238–239.)

Munson further credibly testified that Robert D'Amore "used to help me and he would tell me some things to do. . . . When they put me upstairs, I used to bag and examine the work. If I didn't have anything to examine, he would tell me to bag coats." Regarding her observing him giving instructions to other employees, "[when they] didn't have anything to do, they would ask him what to do and then he would tell them to do whatever work." (Tr. 227–228.)

On several occasions Robert D'Amore represented DA in dealings with the Union. Business Agent DiGenova (who regarded D'Amore as one of the supervisors because of his observations of D'Amore's giving out and looking at work in the shop) recalled that in 1990, when a union shop steward wanted a wage increase, he spoke to D'Amore about it. D'Amore responded that "he would look into it." (Tr. 251–252.)

In October 1992, DiGenova telephoned D'Amore and told him that DA owed the union benefit funds over $40,000 and that the employees would not have coverage unless they started paying it (Tr. 263–264). D'Amore admitted that, at his mother's request, he went to the union hall and worked out an arrangement to pay off the debt at $500 a week (Tr. 50–51, 107, 126).

In early 1993 (when DA was working on low-quality Navasky work), DiGenova dealt with D'Amore concerning a complaint from a state unemployment office employee that when she sent an applicant to DA, someone there told the applicant it was a nonunion shop. D'Amore responded that "They never said that." (Tr. 252–253.)

Edmundo D'Urbano. He was a retired tailor who worked part-time at both DA and Cofab, training employees (Tr. 151–152, 227, 391). D'Amore admitted near the beginning of the trial that at DA, D'Urbano was a supervisor. He testified that as foreman (although working only part time), D'Urbano was the No. 2 person there. (Tr. 41, 47.) In his pretrial affidavit D'Amore admitted that D'Urbano was a supervisor also at Cofab (G.C. Exh. 8 p. 9). At the trial, however, Cofab changed its position on D'Urbano's supervisory status at Cofab.

When called as the only defense witness, D'Amore claimed that D'Urbano's position at Cofab was "quality control" and that under the statutory definition, D'Urbano was not a "supervisor" at Cofab (Tr. 318–319). He went even further on cross-examination. He claimed (as quoted below) that D'Urbano had only a "little" authority over employees at DA (instead of the authority of a "No. 2" person there) and claimed that under "any definition," he was not a supervisor at Cofab (Tr. 373, 394). After admitting (Tr. 391) that D'Urbano's weekly salary at Cofab for 12 hours of work was $350 (over $29 an hour), D'Amore claimed (Tr. 394–395):

> Q. Mr. D'Urbano had some authority over employees at DA. Correct?
>
> A. A little.
>
> Q. But you took away that authority when he worked for Cofab? Correct?
>
> A. That's correct.
>
> Q. Did you tell him he had no authority to tell employees what to do at Cofab?
>
> A. Yes.
>
> Q. So he had no authority to move employees from one machine to another?
>
> A. Not unless I—no, he did not.
>
> Q. Send an employee to the back?
>
> A. He had no authority, no.
>
> Q. What did he do in quality control?
>
> A. He checked out the finished jackets.
>
> Q. If there was a problem, couldn't he tell an employee to improve?
>
> A. He told me or he told Lee [who, as found below, was paid $11.25 an hour].

As indicated, D'Amore did not impress me as being a candid witness. I discredit this testimony as fabrications, designed to support the Company's contention that there were different supervisors at DA and Cofab. I rely on the admission in his pretrial affidavit that D'Urbano was a Cofab supervisor.

Khing Thong Lee. As employee Tigano credibly observed, Lee was the bundle boy at both DA and Cofab. He prepared the work and distributed it to the employees. (Tr. 152). Employee Munson credibly testified that at DA, "If I ran out of work or if anybody ran out of work and [D'Urbano] wasn't there, then Lee would tell me" (Tr. 227). Robert D'Amore testified that as a DA bundle boy, Lee would move work from operator to operator, keeping them from running out of work. He admitted that at DA when both his mother and D'Urbano were absent from the plant—as when his mother left early at 3 p.m. and D'Urbano worked until 12 noon (a half day on his part-time schedule)—Lee gave out the work. (Tr. 47–49.)

After testifying (Tr. 316–317) that Lee had more authority at Cofab than before and "I'd say he's a supervisor," Robert D'Amore gave further testimony that conflicted with his pretrial affidavit. He claimed (Tr. 375) that at Cofab, Lee "can hire somebody." To the contrary, D'Amore admitted in his affidavit (G.C. Exh. 8 p. 10) that only he (and supposedly his wife) can hire employees at Cofab.

In comparison to the weekly salary of $350 for 12 hours' work (over $29 an hour) paid D'Urbano, whom Robert D'Amore claimed was not a supervisor at Cofab, Lee was being paid (Tr. 317, 374) $450 a week for 40 hours work ($11.25 an hour). But even assuming that Lee had more authority at Cofab than he did at DA, the credible evidence is clear that he was still performing the work of a bundle boy.

Robert D'Amore claimed that his wife Deborah has supervisory authority at Cofab, but there is no credible evidence that, if so, she has ever exercised it. She received no compensation. (Tr. 316–317, 371–372.)

I find that Robert D'Amore and D'Urbano were supervisors at both DA and Cofab. Lee, a purported supervisor at Cofab, did similar work at both DA and Cofab. The other DA supervisor, Phyllis D'Amore, although she was not paid any compensation at Cofab, was not absent from there. As found, she called about 20 DA employees back to work at Cofab. Also, as discussed later, she engaged in other activities at Cofab, indicating to employees that she was acting on its behalf. Thus, all the actual and purported supervisors at Cofab were formally employed at DA.

3. Alleged successor

The General Counsel contends in its brief (Br. 33–34) that Confab "convincingly meets the test for successorship" as summarized in *Hydrolines, Inc.*, 305 NLRB 416, 421 (1991):

> An employer, generally, succeeds to the collective-bargaining obligation of a predecessor if a majority of the employees, consisting of a "substantial and representative complement," in an appropriate bargaining unit are former employees of the predecessor and if the similarities between the two operations manifest a "'substantial continuity' between the enterprises." *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27, 41–43 (1987), citing, inter alia, *NLRB v. Burns Security Services*, 406 U.S. 272, 280 fn. 4 (1972).

The Supreme Court in *Fall River*, supra at 43, summarized the factors relevant to determining continuity as follows:

> [W]hether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products and has basically the same body of customers.
>
> These factors are assessed primarily from the perspective of the employees, that is, "whether 'those employees who have been retained will . . . view their job situations as essentially unaltered.'" [Id., quoting *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 184 (1973).]

Further, although each factor must be analyzed separately, they must not be viewed in isolation and, ultimately, it is the totality of the circumstances which is determinative. See *Fall River*, supra.

Cofab in its brief (Br. 9–12) concedes that there is a "continuity of the work force," but contends that the "business of both Cofab and DA are not essentially the same." The Company relies principally on the argument that Cofab's work on low-quality clothing for Navasky is basically different from DA's "traditional" work (before 1993) as a "full-service manufacturer" of high-quality clothing for a "multitude of customers numbered amongst the finer makers of high fashion women's clothing."

I reject this argument as frivolous.

By the end of 1992, DA had lost all this "traditional" work. DA closed a year later on December 17, 1993, when this loss of high-quality work proved permanent. By then, DA had failed to retrieve any of the work and was working exclusively on low-quality clothing from Navasky. It was only after Cofab likewise failed to obtain any high-quality work from DA's former customers, that it stepped into DA's shoes and worked exclusively for Navasky in 1994 as DA had done in most of 1993.

There is no dispute that Cofab's business in 1994 was "essentially the same" as DA's business in 1993.

The credible evidence shows that Cofab's employees were "doing the same jobs" on mostly the same machines in "the same working conditions." They were working under virtually the same supervisors, except that Robert D'Amore had replaced Phyllis D'Amore as owner of the business. Cofab had "the same production process" and produced "the same products." Instead of having "basically the same body of customers," Cofab had the same identical customer.

A majority of the Cofab employees, consisting of a "substantial and representative complement" of the employees in the bargaining unit represented by the Union, were former employees of DA.

I find that these factors, analyzed separately and considered in the totality of the circumstances, indicate that the DA employees who were retained by Cofab would "view their job situations as essentially unaltered." I therefore agree with the General Counsel and find that Cofab was the successor of DA.

4. Alleged *Golden State* successor

The complaint alleges that DA Owner Phyllis D'Amore unlawfully (a) threatened in October to close the business; (b) threatened in October or November to transfer ownership; (c) threatened in December to close and transfer ownership of the business; (d) failed since November to continue in effect the terms of the union agreement by failing to make benefit payments; and (e) closed the DA plant on December 17 without notice and an opportunity for the Union to bargain.

The General Counsel contends that Cofab is a *Golden State* successor, which should be required to remedy these alleged unfair labor practices. The Supreme Court held in *Golden State Bottling Co v. NLRB*, 414 U.S. 168 (1973), that an employer who acquires substantial assets of a predecessor and who continues without substantial change the predecessor's business operations, can be required to remedy the predecessor's unremedied unfair labor practices if it is on notice of the predecessor's unlawful conduct.

I agree, however, with the Company's contention in its brief (Br. 19) that

> The Union's failure to file a timely charge against DA precludes the Board from finding that DA had committed any violations of Section 8(a)(1), (3), and (5) of the Act because such allegations are barred under Section 10(b) of the Act. If the allegations regarding DA's asserted unlawful activity are barred, then Cofab certainly cannot be held accountable where DA committed no recognizable violations.

The Union filed a charge against Cofab on March 2 and an amended charge against Cofab on April 29, but it failed to included DA in an amended charge until June 29, over 6 months after the dates of the alleged unfair labor practices.

Section 10(b) of the Act provides that "no complaint shall issue based upon any unfair labor practices occurring more than six months prior to the filing of the charge . . . against whom such charge is made." Because the charge against DA was not filed within this 6-month limitation period, no unfair labor practices can be found—either by DA (who is alleged to have committed the violations) or by Cofab (through derivative liability).

I therefore find that even though Cofab is the successor of DA, it cannot be required to remedy the predecessor DA's alleged stale violations, outside the 6-month limitation period.

5. Alleged alter ego

In October, as found, DA Owner Phyllis D'Amore stated that she could not pay the contractual fringe benefits for all the employees and that she was going to see a lawyer and "put the business in [her son Robert's] name." Two months later, in December, she told an employee that the city was taking the building (for taxes), that she could not afford the fringe benefits, and that she did not want to run the place any longer. She then revealed, however, that her son was spending his own money to finance the renamed business.

In fact, on December 17 DA did close and Phyllis D'Amore did retire. Robert D'Amore did invest about $60,000 from his retirement fund to open the Cofab plant about 12 or 15 minutes from the old plant. DA's only financial assistance was its acceptance of an 18-month, no-interest note for $5175, after appraisal, in payment for the best of the DA equipment.

The Board held in *Superior Export Packing Co.*, 284 NLRB 1169, 1170 (1987) (fns. omitted):

> [T]he lack of substantially identical common ownership precludes finding that [the successor] was an alter ego of [the predecessor]. Although common ownership is not a prerequisite for an alter ego finding, the Board has found such a relationship absent common ownership only where both companies were either wholly owned by members of the same family or nearly totally owned by the same individual or where the older company continued to maintain substantial control over the business claimed to have been sold to the new company.

Robert D'Amore, who was the sole owner of Cofab, assumed full responsibility for the operation of the new business. His mother merely assisted him, at his request, from time to time without any management or supervisory responsibility and without any compensation. (Tr. 42–45, 149, 165, 169–170, 315, 358–359, 370, 424.)

Thus, although Cofab was the successor of DA, there was completely separate ownership and no control over its business by the owner of the predecessor DA. Under these circumstances I reject the contentions of the General Counsel and Union that Cofab was an alter ego of DA and bound by the terms of DA's collective-bargaining agreement with the Union.

6. Concluding findings

Since late February, when union representatives discovered where Cofab's plant was located and went there to seek recognition and bargaining, Cofab has refused to recognize and bargain with the Union. When the union representatives walked up the stairs to the third floor, Robert D'Amore was there at the top of the steps. He told them that it was a nonunion shop and ordered them "out of the plant." (Tr. 53, 262, 293–295, 323–324.)

Having found that Cofab is the successor of DA, I find that the Union is the bargaining representative of employees in an appropropriate bargaining unit, defined as follows in the DA collective-bargaining agreement with the Union:

> All employees of the Employer including clerical, office employees, except executives, supervisors, administrative, professional, confidential employees or guards, as defined in the National Labor Relations Act.

Accordingly I find that since late February 1994, Cofab has unlawfully refused to recognize and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

B. *Layoff of Italia Tigano*

Employee Tigano was an experienced, versatile operator, having worked in the clothing industry for 39 years. She was the only employee trained to set collars. At DA, where she had been employed since 1989, she did collar setting as well as tape sewing (on women's dresses without collars), sewout work (on the front of jackets without collars, not using tape between the cloth and lining), and various other sewing jobs. (Tr. 132–134, 146, 154–156, 338–340.)

Robert D'Amore admitted that when he requested his mother Phyllis in January to do him a favor and call some DA employees to work at Cofab, she objected to his calling Italia Tigano. Referring to Tigano's union support, she told him not to call Tigano because "Italia is trouble." Being unable to find a collar setter, however, he told her, "I don't care. I need her. I want her. Do me a favor, call her." He testified, "And that's how Italia came to work for Cofab. Over my mother's objections." When Phyllis D'Amore called Tigano, as found, she insisted "no union." (Tr. 141, 182, 395–396, 398, 450–451.)

In late February the union representatives discovered where the plant was located—in an industrial building where there were no signs identifying Cofab on or outside the building or on the door to the plant (Tr. 68–72; C.P. Exh. 1A). When they entered the plant, as found, Robert D'Amore told them it was a nonunion shop and ordered them out. After they left, Phyllis D'Amore accused Tigano of informing the Union where the plant was moved. Tigano credibly testified in her broken English (Tr. 143) that Phyllis D'Amore met with her personally and said:

> [Y]ou the one who bring the union here. You the only one who want the union. I said, no. I never went to the union. . . . I never went and complained [to] them for nothing.
>
> Q. How did she respond?
> A. She say it was me.

The evidence indicates that about the time of this conversation, Robert D'Amore decided to lay the groundwork for removing Tigano from the plant. Since around February 1, Tigano had been setting collars on jackets and doing sewout work on jackets without collars. At the time, there were no new orders for jackets with collars. D'Amore apparently decided, with his mother, to have two other operators (who had in the past helped with sewout work) to be trained further to take over Tigano's sewout work. (Tr. 144–145, 155–158, 163–164.)

On March 9 Tigano noticed that D'Urbano was training the two employees to do the sewout work. She asked him "why you teaching the girls?" and "He say go to Phyllis" or "the boss." Tigano went to Phyllis D'Amore and asked "why you teach somebody?" She answered, "I have to let you go" because of "everything with the union." Then, apparently referring to the recent visit of the union representatives to the plant, Phyllis D'Amore added, "The union wants you out." Tigano told her, "I am innocent. . . . I never told them for nothing. . . . I was one of the innocent—who I love and respect them and I work hard." But she "wouldn't believe me." (Tr. 144–148, 163–164.)

Tigano then went to Robert D'Amore and told him "I'm innocent. Don't let me go, you make a big mistake." He answered that he had no work for her but would call her in 3 weeks. He did recall her in late May, about 2-1/2 months later when more collar setting work was received from Navasky. Having by then obtained a union job, she rejected the offer over the telephone on May 25. (Tr. 148, 191, 193–194, 332–336.) I note that although D'Amore gave a different version of what happened, he testified that Tigano told him on March 9, "I know you're letting me go because I want the Union" (Tr. 327).

I discredit Robert D'Amore's claim that D'Urbano was not training the two employees to do sewout work on March 9 and that "I didn't see him near them." (Tr. 339–341.) I also discredit his unsupported criticism of Tigano's work, claiming that as a collar setter, "I wouldn't say she was the cleanest operator in the world. I didn't think she did the best quality in the world, but she got the work out" (Tr. 397) and that "frankly her quality [on other work] wasn't the greatest" (Tr. 55). It is undisputed that when she went on piece work in 1993, her earnings increased from her hourly rate of $6.50 to $10 an hour (Tr. 134).

The General Counsel contends in his brief (Br. 42) that "The evidence points to a strong prima facie case that [Cofab] discharged Mrs. Tigano because [it] believed that she had informed the Union about Cofab's new and previously hidden whereabouts."

In view of the credited evidence cited above, including the undenied conversations between Tigano and Phyllis D'Amore (whom the employees would reasonably regard as Cofab's agent, speaking for it), I find that the General Counsel has made a strong prima facie showing that Cofab's belief that Tigano was supporting the Union was a motivating factor in its decision to lay her off. *Wright Line*, 251 NLRB 1083 (1980).

Cofab contends in its brief (Br. 8, 20–22) that Tigano "was hired irrespective of her known union membership," that she was laid off for lack of collar setting work, and that she was recalled when more collared jackets were received from Navasky. It contends (Br. 20–21) that "the quality of her non-collar setting work was only marginal" and that because of this, she "was not offered other work to perform." There is, however, no evidence that her other work was "only marginal."

Cofab further contends (Br. 21) that "if Tigano had not been laid off, Cofab would have had to lay off another Cofab employee." This is not established. No other employees, except trainees working only 1 week, were laid off in the first 9 months. Moreover, Robert D'Amore testified that he could not find any other collar setter (Tr. 398) and, as found, he had insisted on his mother's calling Tigano in January to work at Cofab "Over my mother's objections"—admitting, in effect, that he regarded her as a valuable employee whom he would not want to lose.

Cofab's contentions are not persuasive. I find that it has failed to meet its burden of proof that it would have laid Tigano off in the absence of its belief that she was supporting the Union.

I therefore find that Cofab discriminatorily laid off Italia Tigano on March 9 in violation of Section 8(a)(3) and (1) of the Act.

C. *Other Coercive Conduct*

When Phyllis D'Amore telephoned Italia Tigano around the end of January, she conditioned the recall on Tigano's abandoning the Union. By telling Tigano that "if you want to come back, no union" (Tr. 141), she was not merely telling her that she would be working without union wages and benefits.

Robert D'Amore, the owner of Cofab, had specifically authorized Phyllis D'Amore to recall Tigano, making Phyllis D'Amore Cofab's agent. It is obvious that "Under all the circumstances, [Tigano] would reasonably believe that the alleged agent was speaking for management and reflecting company policy." *House Calls, Inc.* 304 NLRB 311 (1991). Moreover, in the language of the Board in *Eddyleon Chocolate Co.*, 301 NLRB 887 (1991), Tigano "could reasonably have anticipated that her future employment depended on whether she refrained from union activity."

I find that Cofab's telling Tigano "no union" upon recalling her was coercive and violated Section 8(a)(1).

Robert D'Amore admits (Tr. 323–324) that in late February, after he met the union representatives at the top of the stairs and told them (in his words), "This is a nonunion shop. Please leave," he called an employee meeting. Tigano credibly testified (Tr. 143) that in the meeting, Phyllis D'Amore told everybody that "anybody wants the union, leave right now."

Although the employees had already been working several weeks, Robert D'Amore claimed that he called the meeting because "there might be confusion whether the people had union benefits" and claimed that he merely explained "this is not a union shop and there were no union benefits here" (Tr. 324–325.) I discredit these claims as fabrications.

I agree with the General Counsel that Phyllis D'Amore's statement that "anybody wants the union, leave right now" was an implied threat to discharge union supporters. I there find that the statement was coercive and violated Section 8(a)(1). *Tualatin Electric*, 312 NLRB 129, 133–134 (1993).

It was after this meeting that Phyllis D'Amore, as found, met with Tigano personally, accused her of informing the Union where the Cofab plant was located, and said that she

was the only one in the plant who wanted the Union (Tr. 143).

I find not only that these statements to Tigano revealed Cofab's discriminatory motivation about a week later when Cofab trained two employees to perform part of her work and laid her off, but that Tigano "could reasonably assume" from the statements that the employees' "union activity was under surveillance." *Lucky 7 Limousine*, 312 NLRB 770, 771 (1993).

I therefore agree with the General Counsel that the statements that Tigano informed the Union where the Cofab plant was located and that she was the only union supporter "created the impression of surveillance of union activities and support" and violated Section 8(a)(1).

CONCLUSIONS OF LAW

1. By refusing to recognize and bargain with the Union since late February 1994, Respondent Cofab as the successor of DA has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

2. By discriminatorily laying off Italia Tigano on March 9, 1994, Cofab violated Section 8(a)(3) and (1).

3. By informing an employee that her continued employment depended on her abandoning support for the Union, threatening to discharge employees if they supported the Union, and creating the impression of surveillance of union activities and support, Cofab violated Section 8(a)(1).

4. Cofab is neither a *Golden State* successor nor alter ego of DA.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily laid off an employee, it must make her whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of her layoff to the date she declined a recall, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]